United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 17, 1998

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Arena Group 2000, A California Limited
Partnership, and Ronald E. Hahn,
General Partner 506-6090-0200
Case 21-CA-32141 512-5012-3300
512-5012-6712
512-5012-6787
578-2025-6750

This matter was submitted for advice regarding whether the Arena Group violated Section 8(a)(1) by filing and maintaining a state court lawsuit seeking to enjoin the Union from publicizing its labor dispute about a terminated food and beverage concessionaire on Arena Property.

FACTS

The San Diego Arena ("Arena") is a free-standing arena facility seating up to 16,000 people. It is surrounded by a 300-yard wide parking lot, and is 120 yards from the nearest public sidewalk. The Arena and its surrounding parking lot collectively are referred to as "Arena Property" herein.

The Arena Property is utilized in several ways. Certain activities -- such as sporting events, concerts, religious rallies, conventions, and meetings -- are held in the Arena. Parking and Arena admission fees are usually assessed for these events. Other activities, such as Kobey's Swap Meet ("Swap Meet"), take place outdoors on the Arena parking lot and charge only an admission fee. During the Swap Meet, the public may use the Arena restrooms but the rest of the facility is closed.

The six entrances to the Arena parking lot are posted with the following sign:

PRIVATE PROPERTY - NO TRESPASSING ALLOWED

> Access limited to Staff, Patrons, Guests, and Business Invitees of the San Diego Arena.

A sign posed near the Arena ticket sales office reads:

> NO TRESPASSING ALLOWED
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> This is private property. Permission to enter is limited to the specific purpose of parking and/or viewing the event to be held within. Any persons who engage in the business of selling or offering tickets or other commodity for sale on these premises without the express permission of San Diego Entertainment, Inc. is committing a trespass and will be removed and prosecuted. Section 602 Penal Code State of California.

In addition, tickets to events held in the Arena contain the following language:

> This ticket is a revocable license and may be taken up and admission refused upon refunding the purchase price appearing hereon. . . . Further, the holder of the ticket agrees not to engage in photography or reproduction in any form of the event for which this ticket is being issued. This ticket may not be used for advertising, promotion (including contests or sweepstakes) or other trade purposes without the express written consent of the event promoter, building management or Ticketmaster. Violation of the foregoing will automatically terminate this license.

The Arena is leased to and operated by Arena Group 2000 ("Arena Group"). Ronald E. Hahn ("Hahn") is Arena Group's managing partner, and he serves as the general manager of the Arena.

From 1995 until April 1996, Premier Food Services, Inc. ("Premier") operated a food and beverage concession inside the Arena pursuant to an exclusive license from Arena Group. The Hotel Employees and Restaurant Employees, Local 30 ("Union") represented employees of Premier and negotiated a collective-bargaining agreement with Premier. In April 1996, Premier's license expired during the term of

the collective-bargaining agreement. Arena Group then awarded the Arena food and concession license to Arena Food Services, Inc. ("Arena Food"). The former Premier employees do not constitute a majority of Arena Food employees.[1] The Union was never recognized by Arena Food, and the Union was unable to demonstrate that Arena Food was a successor to, or alter ego of, Premier based solely on two common principals (the Shihadeh brothers).[2]

In May 1996, the Union began advising the public of the former Premier employees' loss of Union jobs. To date, the Union has engaged in over two dozen instances of handbilling, demonstrations,[3] and/or picketing on Arena property.[4] These activities have occurred on the Arena parking lot during "Kobey's Swap Meets," as well as on the entrance steps to the Arena while the Arena is hosting sporting and other events. There is evidence that groups other than the Union also distribute handbills and solicit

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[1] Very few former Premier employees applied for work with Arena Food. The Region finds that the parties dispute whether the Union encouraged former Premier employees not to apply, or whether Arena Foods filled positions so quickly that former Premier employees were effectively excluded from applying.

[2] The Union filed suit against Premier and Arena Foods to compel arbitration pursuant to its collective-bargaining agreement with Premier. The court dismissed the lawsuit as to Arena Foods, holding that it was not the alter ego of, or successor to, Premier. Hotel Employees, Local 30 v. Premier Food Serv. Mgmt. Group, Inc., No. 96CV1390 BTM(CGA) (S.D. Cal Dec. 5, 1996).

[3] For example, on January 10, 1997, the Union held a major demonstration on the Arena property which was addressed by AFL-CIO President Sweeney.

[4] Initially, the handbills identified Premier as the primary employer, and stated that Arena Foods and the Shihadeh brother had "fired" the former Premier employees. By early 1997, Union literature identified Hahn and Arena Group as being responsible for the "termination" of the former Premier employees, and advocated a consumer boycott of the Arena.

for various causes at the Swap Meet,[5] as well as on the entrance steps to the Arena at sporting and other events.[6] The Union also advertised its dispute in full page advertisements in local newspapers, as well as on a billboard located 1/4 mile from the Arena property.[7] Finally, the Union began purchasing tickets to events inside the Arena and supporters would enter wearing T-shirts displaying slogans relating to the labor dispute. The Union's handbilling and other activities went largely unchallenged until March 1997.[8]

During March 14-20, the Union handbilled the street where Hahn's home is located, the windshield of a Hahn family automobile parked in the Hahns' private driveway, and the front door to the Hahns' house. The Union also drove a truck in Hahn's neighborhood identifying Hahn as the cause for the loss of 86 jobs by former Premier employees. The Union also wrote Hahn a letter indicating

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[5] The Swap Meet posts signs which seem to acknowledge that its customers will be petitioned:

> Kobey's apologizes for any inconvenience caused by petitioners or solicitors outside the swap meet. We do not support or advocate their views. Their presence is permitted only by way of a California court decision.

However, after this sign was brought to the attention of the Arena Group's attorney, the attorney said Arena Group would instruct Kobey's to prohibit future distributions.

[6] Specifically, charities solicit, and handbills advertising local restaurants are distributed, on the entrance steps to the Arena prior to sporting and other events. On at least one instance, a promotional raffle was tolerated on the Arena steps while Arena security guards ordered the Union to leave.

[7] The billboard display describes the disputes as the "Wrath of Hahn."

[8] All dates hereinafter are in 1997 unless otherwise noted.

it would continue its public boycott, handbilling, and picketing against the Arena, Hahn, and Hahn's family for the "next ten years."

On March 26, the Union publicized its dispute at an Arena hockey game. First, the Union held an evening rally on the steps to the Arena entrance. It was attended by approximately 60 persons, mostly women and children. None of the ralliers was employed by Arena Group or Arena Foods. The theme of the rally was that the "Grim Reaper" had killed 86 jobs at the Arena. Ralliers dressed in dark, full-length "Grim-Reaper" hooded robes and kept their heads bowed; some carried candles, hummed the "Death March," passed out fliers urging patrons to boycott the Arena, carried picket signs,[9] and walked in circles. There was minimal contact between Arena personnel and Union supporters while they were outside the Arena.

Following the rally, approximately 40 of the Union ralliers entered the Arena with hockey game tickets. These ralliers still wore their "Grim Reaper" costumes, but did not have candles or picket signs. For a while, these ralliers watched the hockey game. Several Union ralliers secretly brought Union handbills into the Arena and began passing them out over the objections of the Arena guards. A Union representative was informed of the handbilling and agreed to stop it but was unable to do so before the following incident occurred.

During a break in hockey game, some of the Union ralliers assembled in a semi-circle near one of the food concessions. The Region found that the ralliers did not interfere with access to the concession. The Region also found that a Union rallier began dancing to a band that was playing near the food concession and, as a result, dropped Union handbills on the floor. This precipitated a tugging of handbills between an Arena guard and several Union ralliers, which escalated into a fist fight. Arena guards took into custody two Union ralliers. The security guards stated that the Union ralliers en masse attempted to pursue the guards escorting the Union ralliers who were in custody and were forcibly restrained from doing so. The San Diego

[9] The picket signs read "Unfair to Worker - San Diego works best when we say Union Yes" and "Proud to be Union."

police were called and arrested two Union ralliers. Charges against the two arrested Union ralliers were eventually dropped.[10]

On April 2, Arena Group, Hahn and two Arena managers ("Arena Plaintiffs") filed a Complaint for Damages, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction ("Complaint") in Superior Court for the State of California, County of San Diego ("Court"), against Union officers Jef Eatchel, the Union, and unnamed "Doe" agents and/or employees of the Union ("Union Defendants"). The Region has determined that the Complaint was filed in retaliation for the Union's conduct on March 26.

The causes of action alleged in the Complaint are trespass, intentional interference with business relations, violation of Civil Code Section 51.7,[11] intentional infliction of emotional distress, invasion of privacy-intrusion upon seclusion, assault, and battery.[12] The Complaint generally alleges that for the prior ten months the Union "engaged in sporadic picketing and handbilling activities at or about the Sports Arena." It specifically alleges the March incidents at Hahn's home and the March

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[10] The arrested Union ralliers filed a civil lawsuit against Arena Group and Hahn, which is still pending.

[11] This provision provides that parties "have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of . . . their position in a labor dispute."

[12] Trespass is alleged by Arena Group and Hahn against all Union Defendants; Intentional interference with business relations is alleged by Arena Group against all Union Defendants; Violation of Civil Code Section 51.7 is alleged by all Arena Plaintiffs against all Union Defendants; Intentional infliction of emotional distress is alleged by the individual Arena Plaintiffs against all Union Defendants; Invasion of privacy-intrusion upon seclusion is alleged by Hahn against all Union Defendants; and Assaults and battery are alleged by Sanders and Queen against all Union Defendants.

26th "melee" at the hockey game.[13] The Complaint requests, inter alia, a temporary and permanent injunction against the Union Defendants, their agents, employees, and attorneys enjoining them from "picketing, parading, demonstrating, leafleting, marching, standing, sitting, walking, dancing, changing, waving union flags or inducting, encouraging or causing such conduct" on Arena property (specifically, the parking lot, entrances to the Arena, and inside the Arena) or within 150 yards of the Arena, except for two demonstrators on the sidewalks adjacent to the public driveway entrances to the Arena.[14] The Arena Plaintiffs also seek compensatory and punitive damages, and costs of the lawsuit.

On April 24, the Court issued a temporary restraining order which granted the Arena Plaintiffs the temporary injunctive relief they requested. On May 5, the Court issued a preliminary injunction ("Court Order") prohibiting the Union from picketing, handbilling, leafleting and

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[13] According to the Complaint, the Union ralliers were bumping hockey game patrons, and videotaping them; approximately 30 were blocking access to a food concession; three Union ralliers were "wildly" dancing. In addition, six Union ralliers were engaging in handbilling and refused to stop handbilling and leave the building. When one of the individual Arena Plaintiffs attempted to grab handbills out of a Union supporter's hands, he was struck in the neck by the Union supporter's son. When the son was arrested, his parent grabbed the Arena Plaintiff, other Union supporters "joined the fray" and one jumped on the back of the Arena Plaintiff. He, too, was arrested. About 30 to 40 Union supporters pursued the Arena guards, who were taking the two arrested Union supporters to the security office, but were fought off by Arena guards at a stairwell. Several Union supporters disrupted the hockey game by their chant "Let the kid go!", the San Diego police were called and the two Union supporters in custody were arrested.

[14] Additionally, the Complaint seeks a permanent injunction against similar conduct near the private residence of the Arena Plaintiffs or its employees, intimidation and threats of Arena patrons and employees, obstruction of access to the Arena, trespass, and loud and boisterous conduct.

demonstrating on the Arena property and from blocking access to the Arena parking lot. Citing the Supreme Court's Pruneyard decision,[15] the Court specifically found that "neither the parking lot nor the arena building is the equivalent of a traditional public forum." The Court also specifically did not prohibit any individual defendant from attending an Arena event while wearing a "garment advertising the existence or nature of the instant dispute," or from publicizing the labor dispute on the public streets and sidewalks surrounding the Arena and its parking lot. The preliminary injunction is still in effect, and the Arena Plaintiffs' request for a permanent injunction is pending.

On July 9, the Union filed the instant charge against the Arena Group and Hahn which, inter alia, alleges as unlawful the filing and maintenance of the state court Complaint seeking to prohibit Union handbilling on Arena Property.[16] It is this issue on which the Region seeks advice.[17]

ACTION

We conclude that, absent settlement, complaint should issue alleging that the Arena Plaintiffs violated Section 8(a)(1) by filing and maintaining a lawsuit seeking and obtaining overly broad injunctive relief with the unlawful object of discriminatorily excluding the Union from access to the Arena parking lot during Swap Meets, and also from the entrance steps to the Arena when sporting and other

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[15] Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980).

[16] The charge, which has been amended twice, also alleges refusal to allow Union handbilling, threats of violence, physical assault, and arrest of Union supporters.

[17] The Region has concluded that the Union was engaged in concerted protected activity inside the Arena on March 26. As a result, the Region authorized complaint alleging that the attempt to confiscate and actual confiscation of Union handbills, and the assault by security guards on Union supporters, violated Section 8(a)(1). This issue was not submitted to Advice.

events are being held inside the Arena. We further conclude that the Union must move to clarify or amend the Court Order to assert that Pruneyard entitles the Union to handbill in the Arena parking lot during Swap Meets if the Union wants the complaint to include this additional allegation.

A. Bill Johnson's Standard

The Supreme Court held in Bill Johnson's[18] that the Board may enjoin the filing and maintenance of a state court lawsuit as an unfair labor practice only if it lacks a reasonable basis in fact or law, and was commenced for a retaliatory motive. However, Bill Johnson's did not disturb the Board's right to enjoin a state court lawsuit on the grounds that it is "beyond the jurisdiction of the state court[] because of federal-law preemption or . . . has an objective that is illegal under federal law."[19]

An unlawful objective has been defined as a lawsuit which seeks a "remedy that could not lawfully be imposed under the Act."[20] In Long Elevator,[21] the Board used a similar analysis and held that a union had an illegal objective in pursuing a grievance which construed a clause

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[18] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 734-44, 748-49 (1983).

[19] Id. at 737 n.5.

[20] Service Employees Local 32B-32J, (Nevins Realty), 313 NLRB 392, 401 (1993), enf'd in pertinent part 68 F.3d 490 (D.C. Cir. 1995) (union with dispute against subcontractor over its refusal to hire its predecessors' employees had an illegal objective when it filed a grievance against the contracting company over selection of the new subcontractor) (quoting Teamsters Local 705 (Emery Air Freight), 278 NLRB 1303, 1304-05 (1986), remanded on other grounds 820 F.2d 448 (D.C. Cir. 1987)).

[21] Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 (1988), enf'd 902 F.2d 1297 (8th Cir. 1990).

of the collective-bargaining agreement as a "de facto hot cargo provision. . . ."[22]

1. The Complaint and Court Order Have an Unlawful Objective because they Constitute a Disparate Denial 0f the Union's Access to the Arena Property

The Arena Group's successful pursuit of injunctive relief prohibiting peaceful Union handbilling as to the Arena parking lot at Swap Meets and as to the Arena entrance steps at sporting and other events, constitutes an unlawful objective because the Arena Group disparately enforces its no-solicitation policy at both these locations. Specifically, the Complaint and Court Order seek to exclude the Union, but not other groups, from access to the Arena entrance steps during sporting and other Arena events, and from access to the parking lot during Swap Meets.

In its recent Price Choppers decision,[23] the Board wrote that it "has consistently found 8(a)(1) violations when employers allow[ ] nonunion organizations to engage in solicitation and distribution on the employer's property while denying the same privilege to unions." The Board emphasized that the touchstone of such a violation is denial of access to the union for Section 7 activities "while granting access to other outside groups, individuals and activities."[24] Thus, it is immaterial whether the union and nonunion groups actually target the same audience.[25]

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[22] See also, Laundry Workers Local 3 (Virginia Cleaners), 275 697 (1985) (Board quoting from footnote 5 of Bill Johnson's that a lawsuit has an illegal object where it seeks to enforce "fines that could not lawfully be imposed under the Act").

[23] 325 NLRB No. 20, slip op. at 1 (Nov. 8, 1997).

[24] Id., slip op. at 1 n.5.

[25] Id., slip op. at 2.

One of the decisions cited by the Board in Price Choppers as demonstrating its consistent approach to this type of Section 8(a)(1) violation is Be-Lo Stores,[26] which was decided long before the events at issue in the instant matter. In Be-Lo Stores, the Board held that an employer's discriminatory enforcement of a no-solicitation policy, even on an intermittent basis, violates Section 8(a)(1). The Board inferred an anti-union discriminatory motive where the employer "took a laissez-faire approach to the [solicitations of] religious and political groups, while ejecting the union protesters through lawsuits and threats of arrest . . . ."[27]

In the instant matter, the Employer is discriminatorily denying the Union access to exterior areas of Arena Property in violation of Section 8(a)(1). As in Be-Lo Stores, Arena Group tolerated intermittent handbilling and solicitations by non-Union groups while filing a lawsuit to enjoin the Union from engaging in similar conduct. With respect to times when sporting and other events were held inside the Arena, there is evidence that solicitations for charities, handbilling, advertising for local restaurants, and even a promotional raffle have been tolerated on the entrance steps to the Arena, while Arena security guards ordered Union supporters who were also handbilling on the entrance steps to the Arena to leave.[28] Subsequently, the Arena Plaintiffs sought to enjoin only the Union from this activity, but not the other groups. Finally, the Court Order preliminarily enjoins only the Union, not the other groups. Applying Price Choppers and Be-Lo Stores, this disparate denial of Union access to the Arena steps during sporting and other events

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[26] 318 NLRB 1 (1995), enf. denied 126 F.3d 268 (4th Cir. 1997).

[27] Id. at 11.

[28] Under Price Choppers, 325 NLRB No. 20 slip op. at 2, it is not relevant that the nonunion groups allowed access to Arena Property may target audiences different from that of the Union. The sole issue is access, which only the Union is being denied.

vis-à-vis other groups -- as well as the fact that injunctive relief was sought and granted only against the Union -- warrant a finding that Arena Group, by filing and maintaining the lawsuit, discriminatorily enforced its no-solicitation policy against the Union in violation of Section 8(a)(1).

Likewise, there is evidence that groups other than the Union distribute handbills and solicit for various causes on the Arena Property when Swap Meets are held. Indeed, the sign posted at the Swap Meet appears to acknowledge that this occurs at it apologizes to patrons for "any inconvenience caused by petitioners or solicitors outside the swap meet" and states that the Swap Meet does "not support or advocate their views." Despite the presence of various groups that solicit and petition during the Swap Meet, the Complaint and the Court's Order seek to enjoin only the Union's access to the Swap Meet. Once again, applying Price Choppers and Be-Lo Stores, this disparate access interferes with Section 7 activity in violation of Section 8(a)(1).[29]

Since the Arena Group's Complaint for injunctive relief, and the Court Order awarding preliminary injunctive relief, contravene existing Board law prohibiting discriminatory enforcement of no-solicitation rules based on Section 7 activity, the Complaint and Court Order constitute an unlawful objective within the meaning of Bill Johnson's.[30] [*FOIA Exemption* 5

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[*FOIA Exemption* 5, cont'd.

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2. The Complaint and Court Order Have an Unlawful Objective because the Arena Group Lacks a Sufficient Property Interest to Exclude the Union from Handbilling on the Parking Lot at Swap Meets

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[29] See supra at 11 n.26.

[30] 461 U.S. at 737 n.5.

The Arena Group's successful pursuit of injunctive relief prohibiting peaceful Union handbilling as to the Arena parking lot during Swap Meets constitutes an unlawful objective because the Complaint and Court Order fail to appreciate that the Arena Property has multiple uses which result in different rights of access by the Union. Specifically, the Complaint and Court Order erroneously fail to distinguish between the use of Arena Property for sporting and other events (a novel question as to which the Court may have correctly held the property is not a public forum), and the markedly different use of the Arena parking lot during Swap Meets - which use we conclude (in disagreement with the broad Court ruling) must allow access to third party handbillers.

In Bristol Farms,[31] the Board held that "an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals . . . violates Section 8(a)(1), assuming the union representatives are engaged in Section 7 activities."[32] If there is no such property right, there is no need to apply a Lechmere analysis balancing property rights against Section 7 rights.[33] It is the excluding party's threshold burden to establish that it possesses a sufficient property interest entitling it to exclude individuals from its property.[34]

Under California state law, a property owner's right to exclude others from access to private property depends upon the particular use of the property. In Pruneyard,[35]

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[31] 311 NLRB 437, 438 (1993).

[32] Likewise, exclusion of a union from public property also constitutes a Section 8(a)(1) violation. Great American, 322 NLRB 17, 24 (1966); Payless Drug Stores, 311 NLRB 678, 679 (1993).

[33] Bristol Farms, 311 NLRB at 438.

[34] Id.

[35] Robins v. Pruneyard, 153 Cal. Rptr. 854 (Cal. 1979), aff'd 447 U.S. 74 (1980). Accord: Indio Grocery Outlet,

the California Supreme Court held that while a large shopping center must allow outsiders access to collect petition signatures in the shopping center's private central courtyard, such access is not necessarily required to a "modest retail establishment."[36] Likewise, largely because of their more restrictive, specialized use by a small subset of the public, California courts have held that family planning and abortion clinics generally may exclude handbillers from their property.[37]

Where a private property has multiple uses, California courts have looked to each separate use to determine whether there is a public forum. For example, in 1st Street Books v. Marin Community College District,[38] a case decided under the narrower First Amendment law,[39] an

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323 NLRB No. 196, slip op. at 4-6 (1997) (relying on Pruneyard, Board held that a 24,000 square foot stand-alone grocery store violated Section 8(a)(1) when it threatened to arrest Union picketers and handbillers on grocery parking lot and entrance).

[36] Id. at 860.

[37] For example, in Family Planning Alternatives, Inc. v. Pruner, 15 Cal. Rptr. 2d 316, 320 (Cal. App. 1992), the court contrasted a large retail establishment, where it is intended that the public "congregate, relax, visit, seek out entertainment, and browse and shop" for merchandise, from medical center offices whose purpose is to offer specialized, professional, personal services to a specific clientele and which was used by a "small subset of the local citizenry" - clients, tenants, and their employees. Likewise, in Planned Parenthood v. Wilson, 286 Cal. Rptr. 427, 430 (Cal. App. 1991), a family clinic could lawfully exclude protesters from its parking lot as it was not sufficiently dedicated to public use. Instead, the services were intended for a subset of community members, and a notice was posted on the property restricting use to tenants, their employees, and clients.

[38] 256 Cal. Rptr. 833, 841 (Cal. App. 1989).

[39] As the Board explained in Indio Grocery, 323 NLRB No. 196, slip op. at 4-6, in Pruneyard the California Supreme

appellate court rejected a college bookstore's defense that the entire campus was a public forum, and therefore the bookstore could not be enjoined by a private competitor from selling discounted items other than just textbooks or reference books. While noting that a "college campus operated by public authorities, 'possesses many of the characteristics of a public forum,'"[40] the court wrote that whether the bookstore is a public forum is based on its particular use.

> [With respect to the bookstore,] students are not directly involved, and the concern is with the specific use to be made of a specific portion of each of the [college's] campuses by specific parties.[41]

Although, like a college, the bookstore was open to the public and devoted to the communication of ideas and information,[42] the court held that this constituted only a "limited right of entrance" to the bookstore as there was no evidence that the college had a policy of making specific facilities available to the public.[43]

In our view, Arena Group has not satisfied its threshold burden under the Act of showing that it has a right to exclude the Union from the Arena parking lot at the Swap Meets.[44] Contrary to the finding of the Court Order, which appears to view the Arena Property as having one use at all times,[45] we believe that the property has

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Court interpreted the California Constitution's free speech clause as being broader than First Amendment protections.

[40] 256 Cal. Rptr. at 841 (quoting Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).

[41] Id.

[42] Id.

[43] Id. at 842.

[44] See supra at 13 at n.32.

[45] See supra at 8.

multiple uses. One use, which the Court considered, is the Arena during sporting and other events. The entire Arena Property is devoted to these events, and patrons purchase tickets which grant them a revocable limited license to park and view the events. By contrast, the Swap Meet utilizes a portion of the Arena parking lot (and only the restrooms of the Arena) for the purpose of allowing customers to browse through and purchase the merchandise. Under 1st Street Books construing the First Amendment, as well as the less restrictive Pruneyard line of decisions, each of these disparate uses of the Arena property requires a separate public forum analysis.

Applying existing state property decisions addressing the exterior of retail facilities, we conclude that - unlike the Arena during sporting and other events - the Arena Group has no property right to exclude the Union from handbilling on the parking lot at the Swap Meet. Like the sidewalk in front of the large shopping center in Pruneyard, which may not exclude third parties from collecting signatures, the Swap Meet is a freestanding retail facility open to the entire public for its use in browsing and shopping for merchandise. In contrast to the family planning centers and abortion clinics which legitimately may exclude third party access, the Swap Meet does not provide personal services to a specific clientele.[46] Nor does the Swap Meet issue a restrictive public invitation justifying exclusions of non-patrons. To the contrary, the posted sign at the Swap Meet acknowledges that outside groups handbill and petition on the Arena parking lot during the Swap Meets. Thus, any exclusionary property rights held by Arena Group allowing it to prohibit handbilling on the parking lot at Swap Meets have been "worn thin by public usage."[47]

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[46] Cf. Family Planning Alternatives, discussed supra at 14 n.37, which contrasted a professional medical center building from a large retail establishment where the public is intended to "congregate, relax, visit, seek out entertainment, and browse and shop" for merchandise.

[47] In Schwartz-Torrance v. Bakery and Confectionery Workers Union, 40 Cal. Rptr. 233, 238 (1964), which is cited in California's Pruneyard decision, the court held that a

We, therefore, disagree with the California Superior Court in this matter which found, as a preliminary matter, that Pruneyard did not apply to the Arena Property generally because it was not the equivalent of a public forum, and instead conclude that the Court Order has an illegal objective as applied to the Arena parking lot during Swap Meets.[48] However, since it appears that the Court did not have evidence of the Arena property's multiple uses, and therefore did not have an opportunity to consider this argument when it issued the Court Order, it is appropriate that the Union move the Court to clarify or modify the Court Order to permit the Union access to the Arena parking lot during Swap Meets before we proceed with this theory of violation. [*FOIA Exemption* 5

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The Region should not apply a Pruneyard analysis to the interior of the Arena and its entrance steps during sporting and other events because it presents a novel question under Pruneyard. Unlike the Swap Meet property use, which is similar to exterior locations that California courts have often addressed, the state courts have not decided a Pruneyard case involving third party access to the interior of an arena or its entrance steps. This issue is now before the state court which has preliminarily rejected the argument that Pruneyard applies in these novel circumstances. Consequently, no complaint should issue under Pruneyard regarding the Arena interior and its entrance steps.

3. [*FOIA Exemption* 5]

[*FOIA Exemption* 5

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retail strip-mall could not prevent union organizers from picketing in front of a bakery in a mall, where the driveways, sidewalks, stores, and parking lot were generally open to the public. The court noted the substantial free speech rights accorded labor speech under state law, as well as the fact that the owner's property rights were "worn thin by public usage." Id.

[48] See Bill Johnson's, 461 U.S. at 737 n.5.

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[*FOIA Exemption 5*, cont'd.

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B. Conclusion

We conclude that, absent settlement, complaint should issue alleging that the Arena Plaintiffs violated Section 8(a)(1) by filing and maintaining a lawsuit seeking and obtaining overly broad injunctive relief with the unlawful object of discriminatorily excluding the Union from access to the Arena parking lot during Swap Meets, and also from the entrance steps to the Arena when sporting and other events are being held inside the Arena. We further conclude that the Union must move to clarify or amend the Court Order to assert that Pruneyard entitles the Union to handbill in the Arena parking lot during Swap Meets and, if it is successful, [*FOIA Exemption* 5

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B.J.K.

[49] [*FOIA Exemption* 5

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